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Report of the Committee on the Representation of Children in the Provincial Court (Family Division)

June 1977

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REPORT OF THE
COMMITTEE ON THE
REPRESENTATION OF CHILDREN
IN THE
PROVINCIAL COURT (FAMILY DIVISION)

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Ministry of the
Attorney
General

Committee on the
Representation of Children
in the Provincial Court
(Family Division)

The Honourable R. Roy McMurtry, Q.C.
Attorney General for Ontario
Toronto, Ontario

Dear Mr. Attorney:

The Committee on the Representation of
Children in the Provincial Court (Family Division)
has the honour to submit its Report.

Yours respectfully,

Derek Mendes da Costa
Professor Derek Mendes da Costa, Q.C.
Chairman

Clive Chamberlain
Dr. Clive Chamberlain

Barbara Chisholm
Barbara Chisholm

Lee Ferrier
Lee Ferrier, Q.C.

Robert Klassen
Robert Klassen

Lloyd Perry
Lloyd Perry, Q.C.

Karen M. Weiler
Karen M. Weiler

June 21, 1977

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COMMITTEE ON THE REPRESENTATION OF CHILDREN

Part I

Introduction

1. In January, 1977, this Committee was established by the Attorney General for Ontario, the Honourable R. Roy McMurtry, Q.C. Our terms of reference may be summarized as follows:

To consider ways in which children can be more effectively represented in proceedings under Part II of the Child Welfare Act and under the Juvenile Delinquents Act.

2. The Committee members appointed were:

Dr. Clive Chamberlain, Director, Family Court Clinic, The Clarke Institute of Psychiatry;

Barbara Chisholm, Project Director, The Canadian Council on Children and Youth;

Lee Ferrier, Esq., Q.C., a partner in the law office of Messrs. MacDonald and Ferrier;

Robert Klassen, Esq., of the law office of Robert Klassen;

Lloyd Perry, Esq., Q.C., Official Guardian, Ministry of the Attorney General;

Karen M. Weiler, Counsel, Policy Development Division, Ministry of the Attorney General;
and,

Professor Derek Mendes da Costa, Q.C. (Chairman), Faculty of Law, University of Toronto.

3. Your Committee wishes to gratefully acknowledge the participation and contribution of the following parties:

W. Reid Donkin, Esq., Q.C., Area Director of Legal Aid, York County; Alan Wolfish, Esq., Counsel, Metropolitan Toronto Children's Aid Society; Douglas Rutherford, Esq., Q.C., Director, Legal Services Branch, Ministry of Community and Social Services; Miss Margaret Kohr, Solicitor, Legal Services Branch, Ministry of Community and Social Services; Clive Dove, Esq., Counsel, Catholic Children's Aid Society; and Mrs. Margaret Farina, Ontario Association of Children's Aid Societies. While the contributions of each of these parties was most helpful to us, we wish to express our particular gratitude to W. Reid Donkin, Esq., Q.C. and Alan Wolfish, Esq., for their signal contribution to the deliberations of your Committee. Of course, only the members of your Committee have responsibility for the Recommendations contained in this Report.

4. Your Committee wishes to acknowledge the very real assistance of David Hunter who was active in all stages of our deliberations and who undertook administrative and research responsibilities. We have benefitted greatly from his services which have much facilitated the preparation of this Report.

Part II

Procedure of the Committee

5. At its first meeting on February 3, 1977, your Committee established its working procedure; namely, to hold meetings each Thursday, alternating between meetings of the full Committee and meetings of a working group of your Committee. Accordingly, we met in full Committee on the following Thursdays: February 3, 1977; February 17, 1977; March 3, 1977; March 17, 1977; March 31, 1977; April 21, 1977; June 3, 1977; and, June 8, 1977. We met with Inspector Fern Alexander and Staff Sergeant Joan McMaster, Metropolitan Toronto Police Force, at the meeting of March 31, 1977. And we met as a working group on the following Thursdays: February 10, 1977; March 17, 1977; and, March 24, 1977.
6. Your Committee met on February 10, 1977, with representatives of the Judges of the Provincial Court (Family Division), from the Judicial District of York. We met on March 10, 1977, with representatives of the Judges of the Provincial Court (Family Division), from Judicial Districts other than the

Judicial District of York, and with personnel from their courts.

7. In addition, your Committee met on the following dates and with the following parties: namely, February 9, 1977, with a representative of the Ministry of Community and Social Services, and with representatives of the Ontario Association of Children's Aid Societies; February 14, 1977, with representatives of the Ontario Committee on Children and Youth; March 28, 1977, with Inspector Fern Alexander, Youth Bureau, Metropolitan Toronto Police Force; April 4, 1977, with representatives of the Inspector of Legal Offices and Director of Courts Administration, Ministry of the Attorney General; April 6, 1977, with Miss Gloria Klowak, a partner in the law office of Caney and Klowak; April 12, 1977; April 13, 1977; and April 27, 1977.
8. Your Committee wishes to extend its gratitude to all parties who participated in its deliberations. Their contribution was considerable and of very real value to us.

9. Your Committee prepared a form of questionnaire, which was distributed by us to the Judges of the Provincial Court (Family Division). We received forty-two responses from a total distribution of seventy questionnaires. We also prepared five working papers which served as a basis for discussion in the preparation of this Report.

10. In accordance with our terms of reference, your Committee has considered the issue of child representation in the context of existing legislation; namely, Part II of the Child Welfare Act and the Juvenile Delinquents Act. We are aware that legislative reform may occur with respect to the Juvenile Delinquents Act. As well, we have noted the establishment of the Children's Services Division of the Ministry of Community and Social Services and the responsibility of that Division to review the Child Welfare Act.

Part IIIThe Legal Representation of ChildrenInternational Perspectives

11. In recent years, the issue of child representation has been considered in a number of jurisdictions outside Canada. We are aware of the activity that has developed in such jurisdictions and of the very considerable literature that this issue has generated.
12. Upon a review of this activity and of the literature, we are of the clear opinion that the issue of the legal representation of children cannot be considered in a vacuum. In our view, reference must be made to other factors. In considering the manner in which child representation is determined in any particular jurisdiction, reference must be had to the philosophy and intent of that jurisdiction's family legislation. A further relevant factor is whether, within a particular jurisdiction, the court is the preferred vehicle to adjudicate in actions that concern and affect a child. Also of critical importance is the function and role of social agencies in any such jurisdiction.
13. Experience in other jurisdictions indicates that

legal representation of children is a comparatively recent development. Such a development has, in general, required an adjustment to the decision-making process and has involved a re-assessment of the relationship between the social agencies and the courts. What has occurred is an attempt to strike a balance between two critically important interests; namely, the interest of the child to have legal representation and the interest of adults to make decisions on behalf of the child.

14. Several jurisdictions have enacted, in recent years, legislative provision for the legal representation of children. It is proposed to sketch, in a very cursory manner, developments that have occurred in Scotland, Sweden and the State of New York.
15. In Scotland, Children's Panels were established in 1971. A Reporter is appointed for each District in Scotland. A Reporter may receive any information with respect to a child who is in "need of compulsory measures of care." This definition would encompass both child welfare matters and juvenile delinquency matters. The Reporter may bring the child and/or

the family before the Children's Panel for adjudication and for resolution. If the parents and/or the child refuse to appear before the Panel, or do not accept the determination of the Panel, the matter may then be referred to the courts. In this instance, both the child and the family are entitled to legal representation. This service is provided through Legal Aid.

16. In Sweden, Child Welfare Boards have long been established. A child may be brought before a Child Welfare Board. It is within the authority of officials of that Board to bring a child and/or the parents before the Board. If a child is fifteen years of age or less, the Board has full authority to adjudicate both family matters and juvenile delinquency matters. The Board may, in relation to juvenile delinquency matters, refer the child to the courts. Recent amendments to the legislation controlling Child Welfare Boards, permit the child and/or the family to obtain legal counsel to assist both the child and the family to prepare their case before the Board. Such legal representation is also available in the case of

proceedings before the courts. In either instance, legal services may be provided by the State. It must be emphasized that the Board structure has existed for many years but that the availability of legal counsel at the Board stage is a recent development.

17. In both Scotland and Sweden, the first decision-making forum may not be a court. In such circumstance, it appears not likely that a child will have legal representation; although it must be noted that the position in Sweden has not yet crystallized and cannot be stated with any certainty. In either jurisdiction, should there be a subsequent court hearing, consequent upon a hearing before a Children's Panel or before a Child Welfare Board, the possibility exists for child representation.
18. In the State of New York there is no equivalent to the Children's Panels in Scotland or to the Child Welfare Boards in Sweden. While diversion programs of one kind or another do exist, all proceedings in this jurisdiction are judicial proceedings. An office of the Law Guardian has been created. This

office is a component of the Juvenile Rights Division of the Legal Aid Society. The Law Guardian may represent a child in a juvenile delinquency matter or in a child welfare matter. The stated purpose of the Law Guardian is to guarantee procedural and substantive due process for a child. Lawyers representing children through the Law Guardian are, in major urban areas, State employees. In other areas, members of the practicing bar may be appointed. The role of a lawyer provided for the child is analogous to that of defense counsel in an adult criminal matter. At disposition, the function of the lawyer for the child is to work with social workers and psychologists to develop appropriate plans. As a complement to the Law Guardian, the Juvenile Services Unit of the Juvenile Rights Division of the Legal Aid Society provides social services and psychological services to the Law Guardian at all stages in a proceeding.

19. Having very briefly sketched the structure of child representation in Scotland, Sweden and the State of New York, two factors seem to warrant further

consideration. First, in Scotland and in Sweden a non-court structure seems, in the view of each jurisdiction, to be the desirable forum for decision-making. Such a forum appears to be viewed as more amenable to the philosophy of treatment and the concept of community participation. In Scotland, the concept of the court as the forum of first instance was rejected; the procedures and functions of the court were regarded as inappropriate, in the first stage, to determine the best interests of a child. However, where, because of the nature of a particular matter or because a proceeding is at a stage that requires adjudication in court, judicial proceedings are taken, legal representation for the child is available. Secondly, whether the desired forum is a Children's Panel, as in Scotland, or a Child Welfare Board, as in Sweden, or whether, as in the State of New York, all proceedings are judicial in nature, the involvement of social agencies is a matter of critical importance.

Part IV

The Legal Representation of Children

National Perspectives

20. Your Committee has reviewed the positions in several Canadian jurisdictions with respect to the provision of legal representation for children in proceedings under the Juvenile Delinquents Act and in proceedings under child welfare legislation. It should be noted that, as outside Canada, there has been considerable discussion of the issue of child representation. This discussion is still continuing and it may be that different approaches to this issue may emerge within the Provinces of Canada.
21. In each of the Provinces of Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Saskatchewan there is an Office of Ombudsman. We understand that the Acts constituting this Office in these Provinces contain no provisions that are specifically directed to the investigation of complaints by children. We further understand, however, that the Ombudsmen of these Provinces do,

as a matter of course, investigate such complaints when they are related to the actions of a Department or Agency of their respective Province.

22. Your Committee understands that the legal aid scheme of each Province, the Yukon and the Northwest Territories, permits the granting of legal aid certificates for proceedings under the Juvenile Delinquents Act.

23. Your Committee understands that in the Yukon, the Northwest Territories, Prince Edward Island and New Brunswick, there are no civil legal aid schemes. Accordingly, certificates for child welfare proceedings are not provided. All other Provinces may, as a matter of discretion, issue a legal aid certificate for a child welfare proceeding.

24. Your Committee has noted with interest that there are diverse methods of rendering legal services to children in different jurisdictions in Canada. We consider it desirable to make the following brief reference to the position, as we understand it to be, in Alberta, British Columbia, Manitoba, Quebec and

the Atlantic Provinces.

(a) In Alberta, the legal aid scheme permits the issue of certificates in proceedings under the Juvenile Delinquents Act and in child welfare proceedings. There are no provisions in Alberta's child welfare legislation that permit the Court to appoint counsel in a child welfare proceeding. However, as a matter of practice, the Court may appoint counsel in custody proceedings and may seek appointment of counsel in child welfare proceedings.

(b) In British Columbia, the Family Advocate is an employee of the Unified Family Court. He or she may be a lawyer or a paralegal professional, usually a social worker. The Family Advocate must, upon the request of the Court, represent a child in a child welfare proceeding or in a proceeding under the Juvenile Delinquents Act. The Family Advocate may, on his or her own initiative, intervene in any proceeding in the Unified Family Court on behalf of a child. This service is available in only three areas of this Province. In all other areas of British

Columbia duty counsel, or private counsel, may represent a child. The child welfare legislation of the Province of British Columbia permits the Court to appoint counsel for a child.

(c) In Manitoba, the legal aid scheme permits the issue of certificates in proceedings under the Juvenile Delinquents Act and in child welfare proceedings. In proceedings under the Juvenile Delinquents Act, legal counsel may be provided through a network of Community Legal Clinics. In general, in the case of a more serious matter, a child may select counsel from a special panel of the private bar. Unlike the position in Alberta, there is a provision in Manitoba's child welfare legislation that permits the Court to appoint counsel in a child welfare proceeding. Such an appointment may be achieved through the Community Clinic, duty counsel or the private bar. As well, Family Counsellors, who are not lawyers, are attached as employees of the Court to assist children and/or their families.

(d) In Quebec, the legal aid scheme provides that

every person may have counsel in that Province's Social Welfare Court. The provision of such certificates is discretionary for proceedings under the Juvenile Delinquents Act or in child welfare proceedings.

(e) In the Atlantic Provinces, where the legal aid scheme permits, duty counsel is available for proceedings under the Juvenile Delinquents Act and in child welfare proceedings.

Part V

Present Practice in Ontario in Relation
to Child Representation in Proceedings
under Part II of the Child Welfare Act
and in Proceedings under the Juvenile
Delinquents Act

25. A substantial task undertaken by your Committee was an endeavour to ascertain the present practice in Ontario in relation to child representation in proceedings under Part II of the Child Welfare Act and in proceedings under the Juvenile Delinquents Act. We present this Part of this Report as a summary of our findings on this matter. At this stage, we wish to draw attention to two factors. First, particularly in relation to proceedings under Part II of the Child Welfare Act, there seems to us to be no uniform practice across the Province; indeed, the practice in Toronto and in other large metropolitan areas appears to differ from that which obtains in other parts of the Province. Secondly, recognition must be afforded to the importance of the services presently provided under the Provincial legal aid scheme.

A

Proceedings under Part II of the Child Welfare Act

26. It is the view of your Committee that a child, in proceedings under Part II of the Child Welfare Act, does not appear to be a party to the proceedings. Accordingly, not being a party to such proceedings, it seems to follow to us that a child has no independent standing: though it may be noted that, pursuant to s. 32(1)(c), where a child has been committed as a ward of the Crown, the ward upon attaining the age of sixteen years may apply for an order terminating the Crown wardship.
27. It is the view of your Committee that the recent decision of the Divisional Court in Re Helmes (1976), 13 O.R. (2d) 4 (Div. Ct.) discloses a gap in the child welfare legislation of this Province. Upon a review of provincial legislation, the Court held that there was no authority in a Judge of the Provincial Court (Family Division) to appoint the Official Guardian on behalf of a child. However, the Court did state that such a Judge could ask the Official Guardian if he wished to make representations. And, if the Official Guardian did so wish to make

representation, by virtue of s. 25(3) of the Child Welfare Act, the Judge might then hear the Official Guardian on behalf of that child.

28. As a matter of practice, Judges of the Provincial Court (Family Division) do, when there is an apparent need, adjourn the hearing so as to provide an opportunity for the child to obtain legal representation.
29. In some courts it is the practice for duty counsel to appear in child welfare matters. In these courts, duty counsel may represent the child pursuant to the Provincial legal aid scheme. In many cases where the parent of a child is under the age of eighteen years, pursuant to s. 20(4), the Official Guardian must represent such parent. Furthermore, subject to the decision of Re Helmes (1976), 13 O.R. (2d) 4 (Div. Ct.), the Official Guardian is being requested to make representation on behalf of children. Alternatively, the child may retain counsel, or counsel may be retained on behalf of the child, from the private bar. The fees of such counsel are often paid through the Provincial legal aid scheme.

30. So far as your Committee can ascertain, a majority of the Judges of the Provincial Court (Family Division) are of the opinion that lawyers are best qualified to represent a child in child welfare proceedings. It should, however, be noted that this view is not universally held. A sizeable minority of these Judges do believe that lawyers are not best qualified for this purpose and that the task of representing a child should be undertaken by a social worker. There is a clear view that lawyers representing children should have specialized training.

31. Where duty counsel does represent a child in proceedings under Part II of the Child Welfare Act, there is considerable opinion amongst the Judges of the Provincial Court (Family Division) that such representation is not on all occasions entirely satisfactory. This lack of adequacy is perhaps endemic in the present scheme of duty counsel. It arises from diverse factors, including the following: duty counsel may not have sufficient time to prepare a case; there may not be sufficient resources available to duty counsel; and, duty counsel may not possess the specialized skills which, in our

view, are necessary to ensure a desirable quality of legal representation of children.

32. The above position is compounded where there is no continuity of service provided; that is, where the same duty counsel does not represent a child in all stages of a proceeding.

B

Proceedings under the Juvenile Delinquents Act

33. Unlike the position in proceedings under Part II of the Child Welfare Act, a child is obviously a party to proceedings under the Juvenile Delinquents Act. As a party to proceedings, the child has the right to instruct counsel and to seek a certificate under the Provincial legal aid scheme.
34. In most courts it is the practice for duty counsel to appear extensively in juvenile proceedings. Alternatively, a child may obtain a legal aid certificate and instruct counsel from the private bar.

35. The majority of Judges of the Provincial Court (Family Division) expressed the opinion that the representation afforded a child by duty counsel at the adjudication stage is satisfactory. There was, however, a strong view expressed by these Judges that the representation afforded by duty counsel at the disposition stage was not entirely satisfactory.
36. As noted above, your Committee is aware of the importance of the services presently provided under the Provincial legal aid scheme. In our view, however, the present practice of providing such service by duty counsel is not entirely satisfactory. The difficulties that seem to us to exist include difficulties of a systemic nature; that is, there are problems that relate to the access and availability of duty counsel, and to the continuity of service provided by duty counsel.
37. The same factors that have been mentioned in proceedings under Part II of the Child Welfare Act apply, in general, to representation of a child by duty counsel in proceedings under the Juvenile

Delinquents Act. That is: duty counsel may not have sufficient time to prepare a case; there may not be enough resources available to duty counsel; and, duty counsel may not possess the specialized skills which, in our view, are necessary to ensure a desirable quality of legal representation of children.

38. Again, as in the case of proceedings under Part II of the Child Welfare Act, the above position is compounded where there is no continuity of service provided; that is, where the same duty counsel does not represent the child at all stages of a proceeding.
39. In support of the view of your Committee that the problem of the representation by duty counsel of children in proceedings under the Juvenile Delinquents Act is, in part, systemic in nature, mention may be made of the issue of representation at the disposition stage. So far as we can ascertain, the crucial determinant of this issue is whether the child has been represented at the adjudication stage. If a child has been so represented, it appears to us that there is a higher probability that the child will be

represented at the disposition stage. This pattern of representation occurs independent of whether there has been a guilty plea or a plea of not guilty.

40. Mention may also be made of factors that seem to be more intense in proceedings under the Juvenile Delinquents Act than in proceedings under Part II of the Child Welfare Act. These factors are as follows: duty counsel, on all occasions, does not interview a child separate from his or her parents; duty counsel, on all occasions, does not have sufficient information as to the alternatives for disposition; and, there is not sufficient continuity of service provided by duty counsel in representing a child at all stages in a proceeding.
41. With respect to the Crown, it seems to your committee that a Crown Attorney or an Assistant Crown Attorney will likely appear in defended cases. In undefended cases, it seems more likely that a representative of the Crown other than Crown counsel, usually a police officer, will

appear to conduct the prosecution. In the view of the Judges of the Provincial Court (Family Division), the performance of the representative of the Crown, other than Crown counsel, is not entirely satisfactory at the disposition stage. This arises because such representatives of the Crown may not always be fully aware of the alternatives that are available on disposition.

Part VI

Present Practice in Ontario
in relation to Non-Ward Care
Agreements

42. Your Committee is aware of the provisions relating to non-ward care agreements contained in s. 23(a) of the Child Welfare Act. These provisions enable a parent to voluntarily place a child into the care of a Children's Aid Society. In this way a Children's Aid Society can provide immediate and short-term assistance to families without the intervention of the court process. It would appear to us that non-ward care agreements provide a useful social mechanism. It should, however, be noted that such care agreements can be and on occasions are extended to cover a period of up to two years. Furthermore, non-ward care agreements may eventuate in Part II proceedings.

Part VII

Conclusions and Recommendations

43. Your Committee presents, in this Part of the Report, its conclusions and recommendations concerning the issue of legal representation of children in proceedings under Part II of the Child Welfare Act and in proceedings under the Juvenile Delinquents Act.
44. Your Committee separately presents two aspects of these conclusions and recommendations; namely:
 - (a) Conclusions and Recommendations concerning legal representation of children in proceedings under Part II of the Child Welfare Act; and,
 - (b) Conclusions and Recommendations for the establishment of Pilot Projects related to legal representation of children in the Provincial Court (Family Division).

A

Conclusions and Recommendations
concerning Legal Representation
of Children in Proceedings under
Part II of the Child Welfare Act

45. So far as your Committee can ascertain, a practice, albeit of uncertain dimension, presently exists whereby children are afforded legal representation in proceedings under Part II of the Child Welfare Act. Further, it is the position of many Judges of the Provincial Court (Family Division) that, under certain circumstances, a child should have legal representation in such proceedings.
46. As noted, in Re Helmes (1976), 13 O.R. (2d) 4 (Div. Ct.) the Divisional Court held that under Provincial legislation there is no authority in a Judge of the Provincial Court (Family Division) to appoint the Official Guardian on behalf of a child. Indeed, it seems to have been the view of the Divisional Court that there is no authority in such a Judge to appoint any person to represent a child.
47. It is the view of your Committee that Re Helmes (1976), 13 O.R. (2d) 4 (Div. Ct.) discloses a gap in the child welfare legislation of this Province. It is our clear

opinion that the above stated position of many Judges of the Provincial Court (Family Division) is correct; namely, that, under certain circumstances, a child should have legal representation in proceedings under Part II of the Child Welfare Act.

48. Your Committee has reviewed the alternatives that appear to be available with respect to the issue of legal representation of children in proceedings under Part II of the Child Welfare Act. Those alternatives include these options:

(a) To recommend that the Child Welfare Act be amended to establish that a child, in a proceeding under Part II of the Child Welfare Act, is a party to such a proceeding. Being a party to a proceeding a child would have the like right of any other party litigant.

(b) To recommend that the Child Welfare Act be amended to provide for legal representation of a child in prescribed circumstances and to vest

in a Judge of the Provincial Court (Family Division) the discretion to appoint counsel in circumstances not so prescribed.

- (c) To recommend that the Provincial Courts Act be amended so as to vest in a Judge of the Provincial Court (Family Division) the discretion to appoint counsel to represent a child in proceedings under Part II of the Child Welfare Act.

49. While, as noted, your Committee is of the clear opinion that, under certain circumstances, a child should have legal representation in proceedings under Part II of the Child Welfare Act, we are not, at this stage, prepared to recommend that a child should be so represented in all such proceedings. And to make a child a party to proceedings under Part II of the Child Welfare Act would be to contemplate this very result.

In the view of your Committee, a recommendation that a child should be represented in all

proceedings under Part II of the Child Welfare Act must be measured against the strength of two basic factors. First, there is the statutory mandate conferred upon every Children's Aid Society by the Child Welfare Act; namely, the purpose of protecting children where necessary. To make a child a party to proceedings under Part II of the Child Welfare Act and thereby set the stage whereby a child may be legally represented in every Part II application could be viewed as inconsistent with this mandate. On this point there is, indeed, a strong and clear divergence of opinion: there is a firmly held view that it is the Children's Aid Societies that represent a child and that no other representation is required; and there is the equally firmly held view that a child is entitled to legal representation notwithstanding this statutory mandate. Secondly, there is the necessity to strike a balance between the interests of the child to have such representation and the right and responsibilities of adults to make decisions on behalf of that child.

In our opinion, further information is necessary

before these issues can be satisfactorily resolved, information which it is hoped will be obtained from the Pilot Projects referred to below.

50. Your Committee also rejects the second alternative. The reason for the rejection of this alternative by us may be shortly stated: namely, the present difficulty of prescribing circumstances in which a child should be provided with legal representation. This issue is one of some complexity and involves a consideration of manifold factors. Again, it is hoped that the Pilot Projects referred to below will assist in formulating desirable guidelines.
51. Your Committee recommends the third alternative. As noted, as a matter of practice, Judges of the Provincial Court (Family Division) do, when there is an apparent need, adjourn the hearing so as to provide an opportunity for the child to obtain legal representation. Further, as a result of our deliberations, we are of the opinion that circumstances do exist wherein a child should be provided with legal representation. There is, as noted, a present difficulty in prescribing these circumstances. In the result, it is our opinion

that, after hearing submissions on behalf of the child by interested parties, the decision to provide a child with legal representation should be left to the Judges of the Provincial Court (Family Division). We wish to emphasize our view that this is the minimum protection that should be afforded to a child.

We considered whether any such amendment should be inserted in the Child Welfare Act or the Provincial Courts Act. Since this proposal seems to us to be directly linked to the authority of a Judge of the Provincial Court (Family Division), we consider it appropriate that such an amendment be inserted into the Provincial Courts Act.

We do not consider that any such amendment should attempt to particularize the method by which legal representation should be achieved. It should be left to the local Court to evaluate the range of possible alternatives, having regard to the availability of counsel and of community resources.

52. Your Committee has considered the issue of legal representation of a child in proceedings in the

Provincial Court (Family Division), other than in Part II proceedings. We are of the present view that the above recommendation with respect to Part II proceedings may well also be appropriate in relation to such other proceedings. However, while strongly inclining to this view, we are of the opinion that we do not have sufficient information to now support such a recommendation.

53. Your Committee, therefore, recommends that the Provincial Courts Act be amended as follows:

- (a) where a child is not legally represented, to require a Judge at the time of an application under Part II of the Child Welfare Act, or at any stage of such a proceeding, to determine whether legal representation of a child is desirable; and,
- (b) if the Judge is of the opinion that such representation is desirable, to appoint counsel to represent the child.

B

Conclusions and Recommendations
for the Establishment of Pilot
Projects related to Legal
Representation of Children
in the Provincial Court (Family
Division)

54. Your Committee, in formulating its first recommendation, has expressed the opinion that circumstances do exist wherein a child should be provided with legal representation in proceedings under Part II of the Child Welfare Act. We have also emphasized our view that this first recommendation is the minimum protection that should be afforded to the child in such proceedings.
55. Your Committee has attempted to prescribe circumstances in which a child should be provided with legal representation; but, in our opinion, this cannot be done at the present time with the now available information. We have, however, formed the view that there are certain specific areas that can be isolated and that seem to us to merit careful scrutiny, areas that are referred to hereafter.

56. Your Committee has expressed the view that the present practice of providing legal representation for children in proceedings under the Juvenile Delinquents Act by means of duty counsel, is not entirely satisfactory. We have expressed our opinion that the difficulties that seem to exist in this context include difficulties of a systemic nature. And we have pointed out that there are also factors that relate to the quality of legal representation so provided for children.
57. In the case of proceedings under Part II of the Child Welfare Act, the crucial issue, in the view of your Committee, is that of defining circumstances wherein legal representation should be provided to a child. It is on this issue that we consider further elaboration is desirable. In this regard, we have carefully considered the following two basic factors.

- (a) Your Committee has made reference to the statutory mandate conferred upon every Children's Aid Society by the Child Welfare Act: namely, the purpose of protecting children where necessary.

We fully appreciate the very real exertions that have been made by Children's Aid Societies to fulfill this mandate. Nevertheless, it is our view that the representation provided by a Children's Aid Society on behalf of a child may not, on all occasions, be entirely satisfactory. Not every Children's Aid Society has a Court Services Department. There is a divergence of opinion as to the role of a Children's Aid Society in representing a child and there may, in our opinion, be cases of conflict of interest: for example, where the interests of a child, as perceived by a child mature enough to articulate a desire, differ from the opinion of a Children's Aid Society as to that child's best interests. So too, there may be cases where a Children's Aid Society and the parents do not develop deeply enough possible alternative courses of action for consideration by the Court. Further,

it must be recalled that the Child Welfare Act places Children's Aid Societies in an invidious position. A Children's Aid Society may be required to enter into a "case work relationship" with parents and then, possibly, to relate to the Court the circumstances of those parents' neglect of a child.

- (b) Your Committee is aware of two possibly conflicting social interests: namely, the right of a child to assert by legal representation his or her own interests as perceived by the child; and, the rights and responsibilities of adults to make decisions on behalf of the child.

In our opinion, these two basic factors raise issues of considerable complexity and further information is required before they can be satisfactorily resolved.

58. In the opinion of your Committee, in relation both

to proceedings under Part II of the Child Welfare Act and to proceedings under the Juvenile Delinquents Act, it is necessary to develop appropriate rules of practice and procedure to regulate legal representation of children. In this context the procedures and practices that obtain in adult court in civil and criminal proceedings should not, in our view, be mechanically transposed to proceedings in the Provincial Court (Family Division). The objective should be to establish rules of practice and procedure whereby a court is best able to achieve a result that is just in all the circumstances.

59. Your Committee, accordingly, recommends the establishment of a series of Pilot Projects.
60. In the view of your Committee there are broad differences between Judicial Districts within the Province with respect to the following matters; namely, the size of the local bar; the availability of community resources; and, the judicial caseload. The position in Toronto and in other large metropolitan areas seems to

differ from that which obtains in other parts of the Province. It seems obvious to us that any system designed to provide legal services to a child must be related to factors of a local nature.

61. For this reason, your Committee recommends that Pilot Projects be established for a period of one year in each of three Courts: namely, in the Judicial District of York (Willowdale); in the District of Sudbury (Sudbury); and, in the County of Wellington (Guelph).
62. In the opinion of your Committee, in relation both to proceedings under Part II of the Child Welfare Act and to proceedings under the Juvenile Delinquents Act, further information and experience is required in order to structure a system whereby a satisfactory level of legal representation may be afforded to a child. In our opinion, it is the purpose of the above recommended Pilot Projects to provide this necessary information and experience.
63. It seems to your Committee that there are central

issues that require further consideration, and that these issues may be specified. Accordingly, we recommend that any Pilot Project that is established should be instructed to fulfill the following objectives:

- (a) To review all applications under Part II of the Child Welfare Act to determine in what circumstances legal representation for a child is required.

Your Committee has expressed the view that the crucial issue in the case of such proceedings is that of defining circumstances wherein legal representation should be provided to a child. The purpose of requiring this review of all Part II applications is to provide information and experience as a result of which appropriate guidelines may be formulated.

As we have stated, we have attempted to prescribe circumstances in which a

child should be provided with legal representation; but in our opinion this cannot be done at the present time with the now available information. We have, nevertheless, referred to broad considerations that involve complex issues of obvious difficulty, including those in paragraph 57. These considerations must, in our opinion, be carefully reviewed by any Pilot Project. In addition, we have formed the view that there are certain specific areas that can be isolated and that seem to us to merit careful scrutiny. We are of the opinion that any Pilot Project should carefully consider whether a child should be entitled to legal representation in these additional specific areas, which we set out below.

- (i) Where a child is apprehended and where Part II proceedings are instituted and where the child's parents or custodians cannot be located within a reasonable time following such an apprehension.

(ii) Where a child who is alleged to be a "battered child" is taken into care. A "battered child" is understood by your Committee to include a child who is alleged to have been subjected to sexual abuse or exploitation.

(iii) Where a non-ward care agreement is approaching termination or is being revoked and the Children's Aid Society is considering not returning the child to his or her parents or custodians contrary to their wishes.

(b) To review all non-ward care agreements.

At present, non-ward care agreements are not subject to judicial control and may not eventuate in judicial proceedings. The purpose of this review is to determine whether such care agreements should be subject to judicial scrutiny or to some other system of control.

- (c) To assess the relative merits of the existing methods of providing legal representation to children.

In proceedings under Part II of the Child Welfare Act and in proceedings under the Juvenile Delinquents Act these methods presently include the following: namely, duty counsel; referral to the Provincial legal aid scheme; the Official Guardian; the private bar; community clinics; and legal services provided by law schools. The purpose of this activity would be to determine the most appropriate method or methods of providing legal representation for children.

- (d) To assess the appropriate skills and training that should be possessed by counsel representing a child in proceedings under Part II of the Child Welfare Act and in proceedings under the Juvenile Delinquents Act.

The purpose of this activity would be to develop appropriate materials and training programs to ensure that a desirable level of legal representation be achieved.

With respect to this issue and to the attitude of counsel representing a child, there is the troublesome and complex question of whether a lawyer represents "the wishes" or "the best interests" of the child. While there may be no complete or final answer to this question, it does seem to merit the consideration of any Pilot Project.

- (e) To assess the role of the Court in proceedings under Part II of the Child Welfare Act and in proceedings under the Juvenile Delinquents Act.

The purpose of this activity would be to establish guidelines for the role of the Court in such proceedings should

legal representation for a child, particularly in relation to Part II proceedings, become more prevalent.

- (f) To assist in the development of appropriate rules of practice and procedure in the Provincial Court (Family Division).

The purpose of this activity would be to assist in establishing rules of practice and procedure whereby a court is able to achieve a result that is just in all the circumstances. The procedures and practices that obtain in adult court in civil and criminal proceedings should ^{NOT} now, in our view, be mechanically transposed to proceedings in the Provincial Court (Family Division).

- 64. In the opinion of your Committee, the operation of the proposed Pilot Projects should be supervised and their performances evaluated. In

our opinion, such supervision and evaluation is necessary to ensure that the purposes of the proposed Pilot Projects are fulfilled.

65. Your Committee, accordingly, recommends that a Board of Directors be constituted to undertake the following tasks:

- (a) to establish and to organize the proposed Pilot Projects;
- (b) to supervise their operations;
- (c) to evaluate their performances; and,
- (d) to prepare a Report at the termination of these Projects.

66. Your Committee is aware that the practice of child representation in this Province is presently in an embryonic stage. It seems obvious that great care and consideration must be given in determining future development.

67. The effective operation of the Pilot Projects will require competent management, careful supervision and thorough evaluation. To assist the Board of Directors in this endeavour, we recommend that a coordinator be hired for each Pilot Project. The coordinator must be a member of the Ontario Bar and must possess experience in the practice of family law.
68. In relation to the totality of Part II proceedings and proceedings under the Juvenile Delinquents Act, the majority of Judges of the Provincial Court (Family Division) expressed the opinion that where representation of a child is called for, legal representation is most appropriate. Your Committee shares this opinion. We make no recommendation as to the method which should be utilized to provide legal services in any Pilot Project. We suggest that at least the following alternatives or combinations thereof should be considered:

- (a) The provision of services through a staff of no less than three duty counsel who should be appointed for

no less than three months. Should duty counsel be so appointed for this period, this would overcome the present lack of continuity of legal representation;

- (b) The provision of services through the Office of the Official Guardian; and,
- (c) The provision of services through a contract with lawyers specializing in family law. Such a contract could provide legal services either for a proportion of cases selected for representation or for a specific number of days a week for the duration of any Pilot Project.

Your Committee recommends that whichever method of providing legal services be chosen, the lawyers in question obtain a thorough and working familiarity with the range of local services available for children.

69. In the opinion of your Committee, a Crown counsel should be attached to each Pilot Project to act as

a representative of the Crown in all proceedings under the Juvenile Delinquents Act.

70. In the opinion of your Committee, the successful operation of the recommended Pilot Projects will require extensive cooperation and support of all parties who have an interest in proceedings in the Provincial Court (Family Division). Further, it seems to us that the design of each recommended Pilot Project must be adapted to local circumstances: namely, to the needs of the courts; to existing community resources; and, to the access and availability of legal counsel.

71. Your Committee recommends that the Board of Directors establish a local committee for each Pilot Project. In our opinion the composition of this local committee should include:

(a) a Judge of the Provincial Court (Family Division);

(b) a member of the practicing bar;

- (c) a representative of a Children's Aid Society;
- (d) a representative of the regional or local police department;
- (e) a representative of the Legal Aid Office; and,
- (f) the coordinator.

72. The function of each local committee would be to advise and assist the coordinator in the day to day management of the Pilot Projects.

